

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
3

4 Antoine Valentin,  
5 Petitioner

6 v.

7 Warden Brian Williams, et al.,  
8 Defendant  
9

2:17-cv-03124-JAD-VCF

**Order Dismissing Petition**

[ECF No. 1]

10 After a thorough discussion of the limitations period for bringing a federal habeas corpus  
11 action and explaining that this petition missed the May 16, 2017, filing deadline by seven  
12 months, I ordered pro se petitioner Antoine Valentin to show cause why his petition should not  
13 be dismissed as untimely.<sup>1</sup> Valentin's show-cause response does not establish a basis to excuse  
14 the untimeliness of his petition.

15 First, Valentin's unsworn letter response fails to present competent evidence of any fact.  
16 I told Valentin that "all assertions of fact made in response to [my] show-cause order must be  
17 detailed, must be specific as to time and place, and must be supported by competent evidence."<sup>2</sup>  
18 I also advised him that "I will not consider any assertions of fact that are not specific as to time  
19 and place, that are not made under a declaration under penalty of perjury based upon personal  
20 knowledge, or that are not supported by competent evidence filed by Valentin in the federal  
21 record."<sup>3</sup> Valentin's unsworn assertions do not constitute competent evidence.

22 But even if I consider Valentin's unsworn representations, he has not presented facts that  
23 overcome the untimeliness of his petition. First, Valentin does not present a viable basis for  
24 equitable tolling. Equitable tolling is available only if the petitioner can show that: (1) he has  
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26 <sup>1</sup> ECF No. 3.

27 <sup>2</sup> *Id.*

28 <sup>3</sup> *Id.* at 3–4.

1 been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his way and  
2 prevented timely filing.<sup>4</sup> Equitable tolling is “unavailable in most cases,”<sup>5</sup> and “the threshold  
3 necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule.”<sup>6</sup> The  
4 petitioner ultimately has the burden of proof on this “extraordinary exclusion.”<sup>7</sup> Accordingly,  
5 Valentin must demonstrate a causal relationship between the extraordinary circumstance and the  
6 lateness of his filing.<sup>8</sup>

7 Valentin asserts in his letter, among other things, that: (1) neither his attorney on his  
8 direct appeal nor his state post-conviction counsel visited him at prison in response to his  
9 requests in order to discuss his case to help him understand what was being done on his behalf;  
10 (2) Terrence Jackson, his state post-conviction counsel, informed him on February 17, 2017, that  
11 the state supreme court had issued the remittitur and that his representation had concluded; (3)  
12 Valentin was told by an unidentified person that he had one year from the state supreme court’s  
13 decision to “appeal” to the federal courts; (4) he still was and had been “under the impression  
14 that when the court affirmed the decision on Feb. 14, 2017, that [he] had within February 14,  
15 2018, to file [his] appeal;” (5) when an inmate requests that a check be sent from High Desert  
16 State Prison for any reason, it may take up to two months; and he therefore mailed the federal  
17 petition to his grandmother in New Hampshire to mail the petition to federal court with the filing  
18 fee; and (6) he has no legal representation.<sup>9</sup>

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21 <sup>4</sup> *Holland v. Florida*, 560 U.S. 631, 649 (2010).

22 <sup>5</sup> *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

23 <sup>6</sup> *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*,  
24 212 F.3d 1005, 1010 (7th Cir. 2000)).

25 <sup>7</sup> *Id.* at 1065.

26 <sup>8</sup> *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003); *see also Bryant v. Arizona Attorney*  
27 *General*, 499 F.3d 1056, 1061 (9th Cir. 2007).

28 <sup>9</sup> ECF No. 4.

1 Valentin attaches with his response a copy of a February 17, 2017, letter from Terrence  
2 Jackson enclosing the state supreme court's February 14, 2017, remittitur. The letter states that  
3 "[t]his completes my representation of your criminal case." The letter makes no statement  
4 regarding the time to file a petition in federal court.<sup>10</sup> These factual representations would not  
5 establish a basis for equitable tolling, as they do not establish that "some extraordinary  
6 circumstance stood in his way and prevented timely filing."

7 The alleged fact that Valentin's direct appeal and state post-conviction attorneys did not  
8 visit him at prison as he requested during those proceedings does not excuse his failure to file a  
9 timely federal petition. Counsel represented Valentin in those proceedings, not this one.  
10 Attorney Jackson clearly terminated his representation on February 1, 2017, only three days after  
11 the conclusion of the state post-conviction proceedings on February 14, 2017. Any failure of  
12 Valentin's prior lawyers to visit him at prison during his prior proceedings does not excuse his  
13 failure to timely file a federal petition after he was notified of the conclusion of both the state  
14 post-conviction proceedings and Jackson's representation.

15 Rather, it appears from Valentin's unsworn allegations that he failed to timely file a  
16 federal petition because he was told, by some unidentified person, that he had a year after the  
17 February 14, 2017, remittitur to timely file a federal petition,<sup>11</sup> when, in fact, he had just 91 days  
18 left in the statutory period.<sup>12</sup> Any alleged erroneous advice—including if it was by prior  
19 counsel—and any such misunderstanding by Valentin about how the federal one-year limitation  
20 period applied to his case does not provide a basis for equitable tolling. Mistake, inadvertence,  
21 error, miscalculation, or negligence by counsel or by Valentin himself clearly does not present an  
22 extraordinary circumstance establishing a potentially viable basis for equitable tolling under the  
23 governing law.

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25 <sup>10</sup> ECF No. 4 at 5–6.

26 <sup>11</sup> ECF No. 4 at 2 ("I am and was under the impression that when the court affirmed the decision  
27 on Feb. 14, 2017 that I had until February 14, 2018 to file my Federal appeal.").

28 <sup>12</sup> See ECF No. 3 at 1–2 (explaining the calculation).

1 Indeed, in *Lawrence v. Florida*,<sup>13</sup> the Supreme Court rejected the petitioner’s contention  
2 that “his counsel’s mistake in miscalculating the limitations period entitle[d] him to equitable  
3 tolling.”<sup>14</sup> The Court held that “[a]ttorney miscalculation is simply not sufficient to warrant  
4 equitable tolling, particularly in the postconviction context where prisoners have no  
5 constitutional right to counsel.”<sup>15</sup> A long line of Ninth Circuit authority uniformly holds that  
6 attorney negligence, mistake, or error in calculating the federal limitation period does not provide  
7 a basis for equitable tolling.<sup>16</sup> And a pro se petitioner’s lay status and ignorance of the law is not  
8 an extraordinary circumstance giving rise to equitable tolling.<sup>17</sup>

9 Any alleged, general delays in obtaining checks from High Desert State Prison also did  
10 not constitute an extraordinary circumstance standing in the way of and preventing the filing of a  
11 timely federal petition. Valentin does not show that he made a check request within the federal  
12 limitation period that was not processed until after the expiration of the federal limitation period.  
13 He shows instead that he did not send his petition to his grandmother until December 2017,  
14 nearly seven months after the one-year period had already expired. And Valentin’s response  
15 reflects that the cause of his waiting that late to seek to file the petition was his still-continuing  
16 mistaken belief that he had until February 14, 2018, to file. Alleged check processing delays thus  
17 did not cause the untimely filing. Valentin therefore has failed to present a potentially viable  
18 basis for equitable tolling, even if his unsupported factual assertions are assumed to be true.

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21 <sup>13</sup> *Lawrence v. Florida*, 549 U.S. 327 (2007).

22 <sup>14</sup> *Id.* at 336.

23 <sup>15</sup> *Id.* at 336–37.

24 <sup>16</sup> See, e.g., *Randle v. Crawford*, 604 F.3d 1047, 1058 (9th Cir. 2010); *Spitsyn*, 354 F.3d at 800;  
25 *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001); see also *Miranda*, 292 F.3d at 1065–68  
26 (the attorney’s incorrect and thus misleading advice to the petitioner regarding the calculation of  
27 the limitation period constituted negligence that did not give rise to equitable tolling).

28 <sup>17</sup> See *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1013 n.4 (9th Cir. 2009).

1 Valentin has also not demonstrated a potentially viable basis for overcoming the  
2 untimeliness of the petition based upon a showing of actual innocence. This is his explanation:

3 At the end of Judge Dorsey's letter it states I must come  
4 forward with new reliable evidence tending to establish actual  
5 factual innocence. My understanding of this last line is that I must  
6 include evidence that was never brought up at my trial or past  
7 appeals.

8 I would like it to be known that at my trial in January of  
9 2012 NRS 179.500 contents of intercepted communications  
10 inadmissible in evidence unless transcript provided to parties  
11 before trial NRS 179.505 Motion to Suppress, NRS 179.480  
12 Progress Reports to Judge, and NRS 179.490 Sealing of  
13 Applications and Orders were never brought up at trial.<sup>18</sup>

14 I informed Valentin that all assertions of fact made in response to my show-cause order  
15 needed to be detailed, specific as to time and place, and supported by competent evidence.  
16 Valentin has not presented specific facts that would tend to establish his actual innocence, *i.e.*,  
17 that no juror acting reasonably would have found him guilty beyond a reasonable doubt. Instead,  
18 his response refers to alleged violations of various state statutes. But he must establish actual  
19 factual innocence, not merely legal insufficiency due to an alleged procedural violation.<sup>19</sup> The  
20 petition will therefore be dismissed with prejudice as untimely.

21 Regarding Valentin's request in his response for appointment of counsel, I do not find  
22 that the interests of justice require the appointment of counsel in this case. The petition is  
23 untimely on its face, and Valentin has not presented a potentially viable factual basis for  
24 overcoming the untimeliness of the petition following a show-cause order outlining the relevant  
25 procedural history and applicable law. Rather, Valentin's response reflects that he filed an  
26 untimely petition because he was misinformed about or misunderstood the statute of limitations.  
27 Appointment of counsel therefore is not warranted for further factual development, as a  
28 potentially viable factual basis for overcoming the untimeliness of the petition has not been  
presented.

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<sup>18</sup> ECF No. 4 at 3–4.

<sup>19</sup> *See Bousley v. United States*, 523 U.S. 614, 623 (1998).

1 **Conclusion**

2 Accordingly, IT IS HEREBY ORDERED that **the petition [ECF No. 1] is**  
3 **DISMISSED with prejudice as untimely.**

4 IT FURTHER IS ORDERED that **a certificate of appealability is DENIED.** For the  
5 reasons explained in this order, reasonable jurists would find not find my decision to dismiss  
6 with prejudice an untimely petition to be debatable or wrong.

7 The **Clerk of Court** is directed to **ENTER JUDGEMENT** accordingly, in favor or  
8 respondents and against petitioner, and **CLOSE THIS CASE.**

9 DATED: January 24, 2018.

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11 U.S. District Judge Jennifer A. Dorsey  
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